HUSTINGS COURT OF RADFORD.

M. GOLDBERG v. THE SOUTHERN EXPRESS COMPANY.

1. EXPRESS COMPANIES—*Regulation of rates—Va. Code, secs. 1215, 1220.* The provisions of secs. 1215 and 1220 of the Code of Virginia, are not unconstitutional as regulations of interstate commerce.

Longley & Jordan, for the plaintiff.

John R. Johnson, for the defendant.

G. E. CASSELL, Judge.

This was a suit brought by M. Goldberg against the Southern Express Company, under section 1220, as amended.

The declaration properly set out the case, under the statute; and the evidence, so far as it need to be stated, was as follows: A firm in Philadelphia shipped to Goldberg in Radford a package of cigars weighing sixteen pounds. The firm delivered the package to the Adams Express Company in Philadelphia, and paid to that company the sum of sixty cents, which the Adams Company collected from the shipper as the proper charge for shipping such a package to Radford.

Thus the package was prepaid, and was so marked on the outside wrapper, the word "Prepaid" being marked in blue pencil. In due time, Goldberg called for the package at the office of the Southern Express Company in Radford. He was handed the package, and informed by the agent that there was 80 cents charges on it. He stated to the agent that the charges had been paid in Philadelphia; the agent said that the waybill did not show prepayment, and that the 80 cents must be paid. The waybill, of course, was made out in Philadelphia; the 80 cents was paid by Goldberg, but after some few days he demanded its return from the Southern Express Company. It was not returned, and after the expiration of ten days, this suit was brought. The package, *in transitu,* passed through a portion of three States, and was transferred to the Southern Express Company by the Adams at Hagerstown.

The defendant demurred to the declaration:

First—Because section 1215 did not apply to a case of this kind; and

Second—That if it did apply, it was unconstitutional, because

this was an interstate commerce shipment, and for this reason the suit for the penalty under section 1220, as amended, could not be maintained.

Not so much stress was laid by counsel on the first contention, and it is untenable.

The demurrer is overruled.

The parties were put to trial, and the jury found a verdict for the plaintiff in the sum of $100.

The defendant company by its counsel moved the court to set aside the verdict as contrary to the law and the evidence.

The question of law involved in the case, arising on the motion to set aside the verdict, as well as on the demurrer, will be treated as considered on this motion.

The second contention presents more difficulty. Counsel for defendant cited and relied principally on *Wabash etc. Railway Company* v. *Illinois,* 118 U. S. 557.

It was agreed as a fact that Congress had not acted in the matter of express rates.

In the first place it is plain that this shipment was an instance of interstate commerce; the question here is, does section 1215, and the enforcement of the penalty under section 1220, so interfere therewith as to violate the interstate commerce clause of the United States Constitution?

Counsel for plaintiff, among other authorities, cited *Peik* v. *Railway Co.,* 94 U. S. 164. In this case, rates for freight, both on shipments from outside the State, and from inside the State to other States, fixed by the legislature of Wisconsin, Congress not having acted, were upheld. It would seem, however, that the *Peik* case has been overruled by the decision in *Wabash etc. R. Co.* v. *Illinois,* 118 U. S. 557, although the facts of the two cases are not so similar as to require a flatfooted reversal.

Nevertheless, the court (page 568 of the later case) uses this peculiar language:

"Of the members of the court who concurred in those opinions [that in 94 U. S. among the number] there being two dissentients, but three remain, and the writer of this opinion [Justice Miller] is one of the three. . . . He is prepared to take his share of the responsibility of the language used in those opinions. . . . It will be seen, from the opinions themselves, and from the arguments of counsel presented in the reports, that the question did not receive any very elaborate consideration, either in the opinion of the court or in the argument of counsel, . . . and the question how far a charge made for a continuous

transportation over several States, which included a State whose laws were in question, may be divided into separate charges for each State, in enforcing the power of the State to regulate the fares of its railroads, was evidently not fully considered."

But by referring to the decision in *Peik* v. *Railway Co., supra,* we find that the above language is peculiar from the fact that Chief Justice Waite, speaking for the court, says, at the very opening of the opinion:

"These suits present the single question of the power of the legislature of Wisconsin to provide by law for a maximum rate of charges to be made by the Chicago and Northwestern Railway Company for fare and freight upon the transportation of persons and property carried within the State, or taken up outside the State and brought within it, or taken up inside, and carried without."

If the court decided this "single question" at all, did they fail to properly consider it? There were five counsel for the appellants in the case, Hon. W. M. Evarts being one of them; and two for the appellees; and the reporter of the case, on page 167, adds this footnote: "These cases were elaborately and at great length argued by the respective counsel. It will be impracticable for the reporter to furnish more than a very condensed synopsis of the argument." And more than 140 cases are cited in the argument.

Again, in the dissenting opinion to the case of *Wabash* v. *Illinois, supra,* delivered by Justice Bradley, with whom concurred Chief Justice Waite and Justice Gray, we find this: "But it is useless to multiply citations which establish or recognize the principles which govern the present case. . . . The very point in question has been already expressly decided by this court. . . . We refer to the case of *Peik* v. *Railway Co.*, 94 U. S. 164."

We thus see how widely the members of the court differ as to what was decided in these very important cases, and how hard it may sometimes be for the appealable court to find and to follow the law, as laid down by the appellate court. And it is to be hoped that a case involving the precise point here may be brought to the attention of our highest court, and be finally put at rest.

I am of the opinion, however, that the present case is not governed by the principles laid down in either one of the cases *supra.* In the present case, it is not disclosed in the evidence how either the 60 cents charge collected in Philadelphia was arrived at, nor how the 80 cents collected from Goldberg was fixed; it was neither

proved nor argued that neither sum was fixed or arrived at under or by the regulation of the statute.

In the present case, the express company demands a freight charge in Virginia for a package upon which no freight at all is due. It collects the freight so demanded, which was more than was demanded as a prepayment, and paid, in Philadelphia. All this wrong was done in Virginia, in violation of a statute, which, in its application to the facts of this case, in no conceivable way, interferes with interstate commerce. To amount to an interference there must be something in the practical working and putting into effect and force of the law to clog, burden or disturb the free flow of commerce, in the shipping from point to point, between States, by some regulation thereof. The "interstate commerce clause" was never intended to be set up as a juridical "city of refuge," wherein those common carriers who may have violated some law, or right, might enter, and be safe from its penalties.

Again, to determine, in any given case, whether a State law is such an interference, in its practical operation, as will render it repugnant, there must be some evidence, or fact, adduced to show wherein, and in what manner the enforcement thereof does so interfere. It is not altogether a mere matter of law. No fixed and inflexible rule can be laid down to apply to every case. "It is not every regulation that amounts to an interference."

If it should prevent an easy, speedy adjustment, and ascertainment of rates from the shipper to the consignee, in different States, or some obstacle be imposed in the way of safe, sure and easy transfer of freight or persons by common carriers from State to State, then, these and such like circumstances would amount to such an interference as to render the law in question obnoxious.

In *Stewart* v. *Comer,* 28 S. E. 461 (Ga.), decided in 1897, is found this language:

"Section 2316 of the civil code provides, in substance, that where any common carrier shall demand and receive, for goods shipped from within or without this State to any point in this State, any overcharge or excess of freight over and beyond the proper, or contract rate of freight, and a demand in writing for the return or repayment of such overcharge is made by the person paying the same, the common carrier shall refund said overcharge within thirty days from the date of said demand, and if it shall fail or refuse to do so within thirty days, then it shall be liable to said person making the overpayment in an amount double the amount of the overcharge. It will be observed that the penalty is not inflicted upon the carrier for making the overcharge, but for its refusal to refund within thirty pays."

So here the express company failed to refund the overcharge of 80 cents for more than ten days after its demand, and for that failure the penalty should be inflicted. In *W. U. Tel. Co.* v. *Tyler*, 90 Va. 297, our court reiterates the principle that Congress might but had not regulated the delivery of interstate telegraphic messages, and that in the absence of Federal legislation on the subject, the State law relative thereto held good. The court goes on to say: "This is an action for the failure to deliver in this State a despatch sent from another State. There is no question as to the extra-territorial operation of the statute."

Here we have an action for the failure to return in ten days, in this State, from a person in the State, and this overcharge not fixed, or made so by the operation of the statute, the evidence showing that 60 cents had been paid in Philadelphia, and 80 cents here, making $1.40 in all.

I cannot set the verdict aside as being, in my view, contrary to the law and evidence.